United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

77-4202.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

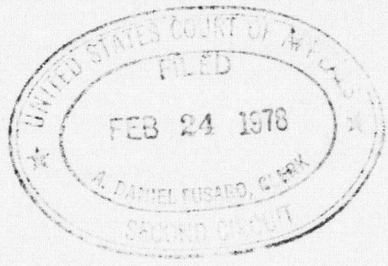
* *

NATIONAL LABOR RELATIONS BOARD, Petitioner

VS.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, MERRIT GRAHAM LODGE NO. 1871, Respondent

No. 77-4202



BRIEF ON BEHALF OF RESPONDENT

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STATEMENT OF THE ISSUE PRESENTED

The issue as stated by the Petitioner:

> "Whether the Board properly found that the Union violated §8(b)(1)(A) of the Act by imposing Court collectible fines on employees solely for the act of resigning from the Union [during a strike]",

fairly states the issue with the exception that the reference "during a strike" in the eyes of the Respondent is irrelevant as set forth herein.

STATEMENT OF THE CASE

The matter is before the Court upon the application of the National Labor Relations Board for enforcement of its Order issued on August 30, 1977 against International Association of Machinists and Aerospace Workers, Merrit Graham Lodge No. 1871. On December 8, 1977, Respondent filed its Answer to the Petition setting forth its position that the Board erred in finding that the Respondent's acts violated §8(b)(1)(A) of the Act.

I. THE BOARD'S FINDINGS OF FACT

The parties filed a Stipulation of Facts on July 14, 1976. The Board, in its decision, adopted these findings of fact including the following:

1. On July 1, 1975, the Respondent Union began an authorized strike against the Electric Boat Division of General Dynamics. The strike ended in November of 1975.

2. During the course of the strike, 26 employees, who had been

members in good standing of the Union resigned from the Union.

3. These individuals returned to work at the struck company during the course of the strike and after resignations.

4. After resolution of the strike, these individuals (and others) were charged with violation of the Union constitution in that they resigned during the course of duly authorized strike. After a Union trial, they were each fined $500 "solely for their acts of resignation during the strike."

5. The Union advised the employees that it would take legal action to collect the fines.

6. Thereafter, a Complaint issued, alleging that the Respondent violated §8(b)(1)(A) by imposing the fines.

7. In imposing the fines, the Union relied on the provisions of Article L §3 of its International Constitution as amended in 1972 and set forth in pertinent part herein:

> "IMPROPER CONDUCT OF A MEMBER
>
> Sec. 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing as hereinafter provided:
>
> Refusal or failure to perform any duty or obligation imposed by this Constitution; the established policies of the I.A.M.; the valid decisions and directives of any officer or officers thereof; or, the valid decisions of the E.C. or the G.L. convention. . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resig-

nation occurs during the period of the strike or lockout or within 14 days preceding its commencement. . ."

The Board, in its decision, (A-1:5)[1/] found that the constitutional language "any other conduct unbecoming a member" was "much too general to provide sufficient notice to members they may not resign during a strike without being fined." The Board then found that "this provision does not restrict the right to resign during a strike." The Board further found "no provision in Respondent's constitution contains any restriction on resignation even during a strike" and in footnote 9, the Board determined "we need not and do not pass on the question of what, if any provision, in a union's constitution or by-laws limiting the time or manner of resignation would pass muster under the Act." The Board then concluded that "members were free to resign at will and that §7 of the Act. . . protected their right to return to work during a strike which had been commenced while they were union members." (A-1:5)

8. The Board then found "the natural and probable consequence of fining them for submitting lawful and effective resignations was to restrain and coerce them in the exercise of their §7 right to return to work during a strike following resignation from a union." (A-1:6) It is Respondent's belief that this conclusion is a non sequitur.

1/ Unless otherwise indicated, references to the pleadings refer to the Appendix filed by the Petitioner, i.e, the number before the colon refers to the document, the number after the colon refers to the page.

ARGUMENT

NOTHING IN §8(b)(1)(A) OF THE ACT PROHIBITS A UNION FROM IMPOSING CONDITIONS, INCLUDING FINES, UPON THE RIGHT TO RESIGN FROM THE UNION

The Act states as follow.: "§8(b) it shall be an unfair labor practice for a labor organization or its agents - (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in §7: provided That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition for retention of membership therein." This statute refers to those rights guaranteed by §7: (61 Stat. 140)

> "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other considered activities for the purpose of collective bargaining for other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §8(a)(3)."

Into these statutes the Board has read two things. First, that a fine imposed upon a member who resigns during a strike, which was called to further the purpose of the labor organization, may not be fined, (although the Board denies making that ultimate decision (A-1:5)), and secondly, that such an act falls within the limited jurisdiction of the National Labor Relations Board. It is the Union's position that such a fine is a part of the internal government of the Union, it does not violate the Act, and is not within the jurisdiction of the Board.

The history of the National Labor Relations Act is significant

in determining this case. The original Wagner Act, 49 Stat. 449 (1935) in §7 (49 Stat. 254) gave employees the right to self-organization and in §8 forbade employers from interfering with §7 rights. No provision was made in the original Act for unfair labor practices by unions. To the argument by the employers that such protection was needed, the United States Senate explained its reasons for its ommissions:

> "The Bill is not a mere police court measure. The remedies against such acts (fraud or violence by labor unions) in the State and Federal Courts and by the invocation of local police authorities are now adequate as arrests in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief from the Federal Courts against fraud, violence or threats of violence." (Emphasis added) S. Rep. No. 573 74th Cong., 1st Sess. 16-17 (1935).

These are the types of actions against §7 rights that Congress intended to prohibit.

In upholding the constitutionality of the Act in NLRB vs. Jones & Loughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937) Supreme Court made some significant findings regarding "the flow of commerce" and the effects of unfair labor practices which tend to promote strife and effect the flow of commerce.

> "If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to National supervision or restraint, 301 U.S. at 36-37."

By 1947, a need was recognized by Congress for a balance to union power and the Taft-Hartley Act of 1947 resulted, (61 Stat. 136). The major subjects of interest giving rise to this Act were, (1) secondary boycotts, (2) closed shop agreements, (3) strikes and picketing which led

to violence, (4) union corruption, and (5) jurisdictional disputes, see Morris, The Developing Labor Law 37 (1971).

The significant shanges in the Act, so far as we are concerned, appear in amended §7 as set forth above in the appearance of prohibitions against union unfair labor practices. If we accept the Board's decision, we must then conclude that fining union members who resign during the course of a strike, will in some way, foment industrial strife and violence, and therefore, were intended to be prohibited by the drafters of the Act. We respectfully suggest the opposite is true. Anyone who has observed a picket line is aware of the intense feelings that arise when pickets are confronted with strikebreakers returning to work. To suggest that the safety valve of a fine, i.e., a price for abandoning the organization, is more likely to lead to violence and strife than resignation with impunity, is to avoid reality. It is respectfully suggested that the "restraint and coercion" prohibited by §8(b)(1)(A) were clearly intended to prohobit violence, threats and other strongarm tactics which were within the original intent of the drafters of Taft-Hartley. In fact, to hold otherwise, ignores the explicit language of §8(b)(1)(A) permitting a labor organization to prescribe its own rules regarding the acquisition or retention of union membership. This record is barren of any evidence to justify the Board's finding that "the natural and probable consequence of fining them for submitting lawful and effective resignations was to restrain and coerce them in the exercise of their §7 right to return to work." (A-1:6)

In fact, again the opposite is true. These employees freely

elected to resign from their union and to accept whatever sanctions the union chose to impose for the act of resignation. To hold that these employees had no notice that their resignation was circumscribed in any way, flies in the face of history and reality. The Board would have us believe that a member of an association locked in an economic struggle with an employer, engaged in picketing, and all the attendant furor of an economic strike, would be unaware and without notice that his resignation would be "conduct unbecoming a member" of the union. It is possible that there are, in this enlightened age, workers of such incredible naivete that they would be unaware of the natural consequence of their actions. However, the rights of these workers are amply protected by the notice and hearing provisions of the I.A.M. Constitution, which provides for notice of the specific allegations of wrongdoing, and an opportunity to be heard and to present such denials or mitigating circumstances as may exist.

The issue may be restated to question:

"May a labor organization set reasonable restraints upon termination of membership?"

It is our position that the answer to the question is clearly, yes. As was pointed out in NLRB vs. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S.Ct. 2001 at 388 U.S. 185:

> "What legislative materials there are dealing with §8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional, internal union discipline, in general, or disciplinary fines, in particular. On the contrary, there are a number of assurances by its sponsors, that the section was not meant to regulate the internal affairs of unions." . . . . The first suggestion that restraint or coercion of employees in the exercise of §7 rights should be an unfair labor practice, appears in the statement or supplemental used to the Senate report. . . . The mischief against

> which the statement invade was restraint and coercion by unions in organizational campaigns." (emphasis that of Supreme Court)

The Court then goes on to refer to threats of reprisal against employees and their families, in the course of organizing campaign, and direct interference by mass picketing and other violence. At 388 U.S. 188, the Court again cites legislative history to the effect:

> "It was never the intention of the sponsors for the pending amendment to interfere with internal affairs or organization of unions."

The Court goes on to uphold the proposition that a union may impose a fine as a lesser penalty than expulsion, which carry the threat of expulsion for non-payment.

If a union member may be fined and expelled for non-payment of a fine without violating his §7 rights for violation of strictly internal union rules, how can it reasonably be argued that a fine for resignation under strike conditions violates §7 rights. Allis-Chalmers upheld the right of a union to fine its members who crossed picket lines. In Scofield vs. NLRB, 394 U.S. 423, 89 S.Ct. 1154, fines for exceeding production quotas were upheld as not coercive or illegal restraint. See also Minneapolis Star & Tribune Co., 109 NLRB 727 (1954). In summary, the state of the law appears clearly to be that a union may fine its members for any reason related to its objectives and purposes and the reasonableness of those fines are properly a matter for the Courts to determine. See Machinists and Aerospace Workers vs. NLRB, 412 U.S. 84, 93 S.Ct. 1278 (1961).

ARGUMENT

THE BOARD EXCEEDED THE JURISDICTION GRANTED BY THE NATIONAL LABOR RELATIONS ACT.

The Board has consistently found that fines for post resignation conduct are unlawful. Local Lodge No. 1994, I.A.M. (OK Tool Company, Inc.), 215 NLRB 651 (1974). International Association of Machinists and Aerospace Workers, District Lodge 115 (Dalmo Victor Co.) 231 NLRB 115 (1977).

In the instant case, it is respectfully submitted that the Board, in fact, determined that the Respondent herein has committed the same prohibited act as was found in NLRB vs. Granite State Joint Board, 409 U.S. 213, 93 S.Ct. 385. The Board's finding, at A-1:6:

> "The natural and probable consequence of fining them for submitting lawful and effective resignations was to restrain and coerce them in the exercise of their §7 right to return to work during a strike following resignation from a union."

How the Board arrived at that conclusion, we have no knowledge since there is certainly no testimony in the record. If we accept the premise, a member could be fined simply for the act of resigning and not going back to work, the employee's post-resignation conduct becomes irrelevant. If we accept the fact that the fines were levied solely for the act of resignation, the fact of the employee returning to work at a struck plant becomes irrelevant. The size of the fine may be influenced by the conduct of the employee after resignation, but this requires an examination of the motives of the Trial Board which is not in the record. The employee's reasons for resignation, the economic circumstances which

induced him to take employment at a struck plant, the absence of work elsewhere, are all factors which can be determined at the quasi-judicial hearing afforded to that employee. It must be noted and emphasized that no suggestion has been made that the procedural due process requirements set forth in Landrum Griffin, 29 U.S. §411(a)(5) were denied any of these employees. Therefore, we must conclude, that all procedural safeguards were afforded to each of the fined employees. Therefore, we are led to the conclusion that the Board has examined the union's motivation for imposing a fine, i.e., to prevent the employee from working at Electric Boat. In so doing, the Board is delving into internal union affairs in a manner in which the Supreme Court has consistently held, Congress did not intend. NLRB vs. Boeng Company, 412 U.S. 67, at 75, Motor Coach Employees vs. Lockridge, 403 U.S. 274, 296. Issues as to the reasonableness or unreasonableness of fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law of as may be applied in a forum competent to adjudicate the issue. The Courts, rather than the Board, have acquired the necessary expertise in adjudicating these relationships. A "provision which would limit the termination rights of a party (to a contract) may be implied into the bargain under certain circumstances." Clausen & Sons vs. Hamm Brewing Co., 395 F. 2d 388, 391, note 3 (CA8 1968). Similarly, an agreement of indeterminate duration is terminable, but only after a reasonable lapse of time and upon reasonable notice. Miller vs. Miller, 134 F. 2d 583, 588-589 (CA10 1943), Boeng Airplane Co. vs. NLRB, 85 U.S. App. D.C. 116, 174 F. 2d 988 (1949). And of course, the right to quit employment is subject

to reasonable restraints on future employment regarding the employee's use of skill, information and knowledge acquired in his former employment. NLRB vs. ILGWU, 274 F. 2d 376, (CA3 1960). Resignation of a carrier from a shipping conference does not prevent the conference from trying the carrier for pre-resignation infractions in accordance with changed procedures instituted subsequent to resignation. Pacific Coast European Conference vs. FMC, 439 F. 2d 514 (C.A.D.C. 1970). Finally, recognizing the union constitution as a contract, it is elementary that "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise." 1. Corbin, Contracts, 2. (1950). In short, motive for the imposition of restraints on resignation is properly a subject for State Court inquiry when the union attempts to enforce its fine and not within the jurisdiction of the NLRB.

The union has accepted, for the purposes of this argument, the Granite State holding, that a mid-strike resignation frees the member from further obligations. But to accept the inevitable next step, that resignation itself is free from sanction, results in the impossible conclusion that Congress intended to encourage, in its search for economic peace, employer-solicited strike breaking. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes." Polin vs. Kaplan, 257 N.Y. 277, 177 N.E. 833, 834 (1931). To accept the Board finding, we must conclude that union members were without notice that their resignation would be damaging to their association, would act to defeat the purposes of the union, would injure their fellow members, and in fact, might destroy the

union itself; and further, that by committing these acts, they would be free from any sanctions.

We must further conclude from the Board decision, that resignation with impunity will further the cause of industrial peace, restore equality of bargaining power between employers and employees, and in other ways, carry out the purposes of the drafters of the Act. We suggest the opposite conclusion is more consistent with reality.

Assuming the "laboratory atmosphere" so popular with the Board, the act of resignation and its resulting fine should be considered not in the light of the strike and the subsequent return to work, but simply as an isolated act. If the I.A.M. imposed restraints upon resignation at any time, (as it may under a union shop contract), would it violate the Act and grant jurisdiction to the Board? So long as the employee's status as an employee is left alone, the union may discipline the employee as a member for failure to perform a valid membership obligation. One of those obligations is not to abandon ship during the battle. To rule otherwise is to empty the NLRA of any meaning as a means to create equality between employer and employee. In each strike, the employer may inform his employees they are free to resign, and return to work and collect a day's pay while the union militants walk the picket lines. The consequences of that interpretation, as they apply to industrial peace, are too obvious to need enumeration here.

CONCLUSION

Respondent respectfully submits, for the reasons set forth, that this Court should deny enforcement of the Board's Order.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
MERRIT GRAHAM LODGE NO. 1871
By its Attorney,

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VS.		No. 77-4202
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, MERRIT GRAHAM LODGE NO. 1871, Respondent		

CERTIFICATION

The undersigned hereby certifies that two (2) copies of the Respondent's Brief in the above-named matter were mailed to the Petitioner's attorneys of record, John Elligers, Esquire and Jesse I. Etelson, Esquire, National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington DC 20570 and one (1) copy to the following: Elliott More, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, DC 20570 and to Arthur G. Telegen, Esquire, Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02109, via Certified Mail, Return Receipt Requested on the 22nd day of February, 1978.

BRESLIN, SWEENEY & GORDON

BY Stephen Lichatin III

Stephen Lichatin, III, Esquire
10 Jefferson Boulevard
Warwick, Rhode Island 02888

STATE OF RHODE ISLAND

COUNTY OF KENT

Subscribed and sworn to before me this 22nd day of February, 1978, at Warwick, Rhode Island.

Jean M. Grazarelli
Notary Public

My Commission Expires June 30, 1981